

ORIGINAL
RECEIVEDBEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

APR 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-88
EZ COMMUNICATIONS, INC.)	File No. BRH-910401C2
For Renewal of License of FM Radio)	
Station WBZZ(FM) on Channel 229B)	
at Pittsburgh, Pennsylvania)	
ALLEGHENY COMMUNICATIONS GROUP,)	File No. BPH-910628MC
INC.)	
For Construction Permit for)	
a New FM Broadcast Station on)	
Channel 229B at Pittsburgh,)	
Pennsylvania)	

To: Honorable Edward Luton
Administrative Law Judge

MOTION TO CERTIFY HEARING
DESIGNATION ORDER TO THE COMMISSION

Morton L. Berfield
John J. Schauble
Cohen and Berfield, P.C.
1129 20th Street, NW, #507
Washington, DC 20036
(202) 466-8565

Attorneys for Allegheny Communications
Group, Inc.

Date: April 12, 1993

DLI

TABLE OF CONTENTS

	Page
SUMMARY	ii
I. INTRODUCTION	1
II. BACKGROUND	3
III. THE STANDARD FOR CERTIFICATION	7
A. Controlling Question of Law	8
B. Expedition of Litigation	8
C. Substantial Ground for Difference of Opinion	10
1. Indecency Issue	11
2. Sexual Discrimination	13
3. Abuse of Process Issue	15
4. Character/Defamation Issue	18
5. News Distortion Issue	19
IV. CONCLUSION	19

SUMMARY

Allegheny requests that the Presiding Judge certify that Allegheny may file an immediate application for review of that portion of the Hearing Designation Order (HDO) denying Allegheny's "Petition to Deny" against the renewal application of EZ Communications, Inc. (EZ). Certification of the HDO is required because Allegheny's petition involved a controlling question of law, certification would materially expedite the resolution of the litigation, and there are substantial grounds for differences of opinion with respect to the HDO.

A controlling question of law is present because EZ's basic qualifications to remain a Commission licensee are in question.

Certification would materially expedite the resolution of the litigation because it would avoid the substantial possibility of a remand by the Commission or the Court of Appeals after hearings are held and decisions are issued. The HDO did not use the proper standards in evaluating Allegheny's petition to deny.

With respect to each issue requested by Allegheny, there are substantial grounds for differing with the HDO. With respect to WBZZ's indecent broadcasts, the alleged procedural bars to consideration of the programming are not well-founded, and the HDO mischaracterizes the number of broadcasts at issue

and the actions taken by EZ. The HDO's response to Allegheny's request for a sexual discrimination issue misstates the scope of conduct covered by the EEO rule, ignores the fact that the arbitration proceeding involving EZ did not settle, and incorrectly assumes that the Commission will ignore an adverse jury verdict if a proceeding settles on appeal. In denying to specify an abuse of process issue against EZ, the HDO blatantly misstates that EZ did not pay its former news director to refrain from filing pleadings with the Commission against EZ. The Commission's handling of requested character and news distortion issues suffers from similar errors.

RECEIVED

APR 12 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of) MM Docket No. 93-88
)
EZ COMMUNICATIONS, INC.) File No. BRH-910401C2
)
For Renewal of License of FM Radio)
Station WBZZ(FM) on Channel 229B)
at Pittsburgh, Pennsylvania)
)
ALLEGHENY COMMUNICATIONS GROUP,) File No. BPH-910628MC
INC.)
)
For Construction Permit for)
a New FM Broadcast Station on)
Channel 229B at Pittsburgh,)
Pennsylvania)

To: Honorable Edward Luton
Administrative Law Judge

MOTION TO CERTIFY HEARING
DESIGNATION ORDER TO THE COMMISSION

Allegheny Communications Group, Inc. (Allegheny), by its attorneys, and pursuant to Section 1.115(e)(3) of the Commission's rules, now requests that the Presiding Judge certify to the Commission the Hearing Designation Order¹ (HDO) to the extent that the HDO denied Allegheny's June 28, 1991 "Petition to Deny" directed against the renewal application of EZ Communications, Inc. (EZ).

I. INTRODUCTION

Allegheny's petition to deny raised issues of fundamental importance to the Commission. In its petition, Allegheny presented a prima facie case that EZ had repeatedly broadcast

~~indecent programming exposed in a particularly offensive form~~

used its station to defame its former news director and engaged in news distortion. Individually, each of these matters is of fundamental importance to the Commission. With respect to indecency, Chairman Quello and the Chief of the Mass Media Bureau recently informed Congress that licensees who repeatedly broadcast indecent programming would have their license revoked. See the enclosed article from the March 29, 1993 Broadcasting & Cable, submitted as Attachment 1 to this motion. Similarly, the Commission has designated renewal applications for hearing when there have been serious violations of the Commission's EEO rule, and it has been instructed to do so by the Court of Appeals when it has not done so. Dixie Broadcasting, Inc., 7 FCC Rcd 5638, 71 RR 2d 957 (1992), Beaumont Branch of the NAACP v. FCC, 854 F.2d 501, 65 RR 2d 367 (D.C. Cir. 1988). This case involves a particularly insidious and troublesome form of discrimination: sexual harassment.

As Allegheny will show in greater detail below, the HDO's action is based upon several critical factual misstatements as well as misstatements of the law. For example, the HDO claims that there is no evidence that Elizabeth Randolph was paid to refrain from filing a petition to deny or informal objection. HDO, ¶15. That claim is directly contradicted by the terms of the settlement between EZ and Ms. Randolph. The HDO contains other such blatant errors. Before demonstrating that the

legal test for certification is met, however, Allegheny will provide the Presiding Judge with the factual background necessary to understand this case.

II. BACKGROUND

In this case, there were two adjudications of misconduct by EZ in connection with certain statements made over the air concerning WBZZ news director Liz Randolph. The first adjudication was a November 16, 1988 opinion of an arbitrator sustaining a grievance brought on Ms. Randolph's behalf for severance pay. A copy of the arbitrator's award and opinion is submitted as Attachment 2 to this motion. Attachment 3 to this motion is an October 16, 1989 Opinion and Order of United States District Judge Donald E. Ziegler sustaining the award.

The arbitrator's opinion details a continuing series of "jokes and suggestive remarks that were directed to [Ms. Randolph that] were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have been subjected to..." Attachment 2, P. 12. The arbitrator's findings set forth in detail his findings of a continuing series of lewd and offensive comments made over the air by EZ's disc jockeys, Jim Quinn and Don "Banana" Jefferson, about Ms. Randolph's sexual behavior. The opinion states as follows:

The grievant's un rebutted testimony was that these comments first began in February, 1986 while she was on vacation on a Caribbean Cruise. Quinn and

Banana stated during their program that she was on the "Love Bloat" [sic] and that she was having promiscuous sex with various people on the cruise ship. Apparently these and similar comments were made the entire time she was on vacation as an on-going topic for their brand of 'humor'... (Arbitrator's Opinion, P. 3).

The next on-the-air comments occurred in July, 1986 while the grievant was vacationing in Cape Cod, Massachusetts. The grievant testified that upon

"It says, 'Let go of my ears, I'm doing the best I can.'"

The arbitrator found there was no doubt that the "joke" referred to oral sex. Arbitrator's Opinion, Pp. 4-5. When Ms. Randolph learned of this "joke," she became distraught and left the station. EZ's response to that action was to fire Ms. Randolph and to contest her right to severance pay on the grounds that she engaged in "a flagrant neglect of her duties..." In holding that EZ acted improperly in denying severance pay, the arbitrator concluded (Attachment 2, P. 13):

There is no question, under these circumstances, that the grievant's action of walking off the job was not only understandable, but more importantly, was justifiable. The conduct on the part of the disc jockeys was degrading, humiliating and a serious invasion of her personal rights and dignity. I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance. These circumstances are a narrow exception to the self-help rule and justify the grievant's actions.

Meanwhile, Ms. Randolph sued EZ, Jefferson and Quinn in the Court of Common Pleas, County of Allegheny, Pennsylvania for defamation, intentional infliction of emotional distress, and invasion of privacy (Case No. GD88-02730). On February 14, 1990, the jury hearing the case entered a verdict in favor of Ms. Randolph and against EZ on the defamation and invasion of privacy counts and against Jefferson and Quinn on all three

counts.² The jury awarded damages of \$694,204, which was slightly reduced by the Judge. A copy of the jury's verdict is submitted as Attachment 4 to this petition.

Ms. Randolph also filed a complaint with the Pennsylvania Human Relations Commission alleging violations of Pennsylvania law prohibiting sex discrimination. After receiving a right to sue letter from that agency, she commenced a second action in Pennsylvania state court (Case No. GD89-22010).

On May 24, 1991, EZ and Ms. Randolph entered into a settlement with respect to the state court actions - the first action, which was on appeal, and the sex discrimination case, which was still pending before the trial court. Attachment 5 to this petition is a declaration from Lewis I. Cohen explaining his attempts to obtain information about the

~~settlement with amounts from the transcript of proceedings~~

unlikely event some party that we don't know about files a complaint, she will refuse to testify on the grounds that the Court Order in this present case prohibits her; and, it is understood that if that Order doesn't prevent her, that that will not be a violation of this agreement.

"In other words, she will go as far as refusing to testify and saying that you'll have to get approval from Judge Musmanno who will not give approval. If somehow I'm overruled by some higher court, then understand that that's not a breach of the agreement. She has given her assurance that she will not do anything voluntarily in any way to cause you a problem with the FCC. I mean I don't know how much broader I can make it other than that."

The settlement agreement was never submitted to the Commission for approval pursuant to Section 73.3589 of the Commission's rules.

III. THE STANDARD FOR CERTIFICATION

Section 1.115(e)(3) of the Commission's rules requires that an Administrative Law Judge certify a hearing designation order to the Commission for immediate consideration of an application for review if (1) the matter involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) ~~immediate consideration of the question would materially~~

Commission's rules. Under the test, the Presiding Judge is not required to determine that the HDO was wrong before certifying the HDO. Instead, so long as the Presiding Judge finds that a substantial ground for difference of opinion, and the other standards for certification are met, certification is required.

A. Controlling Question of Law

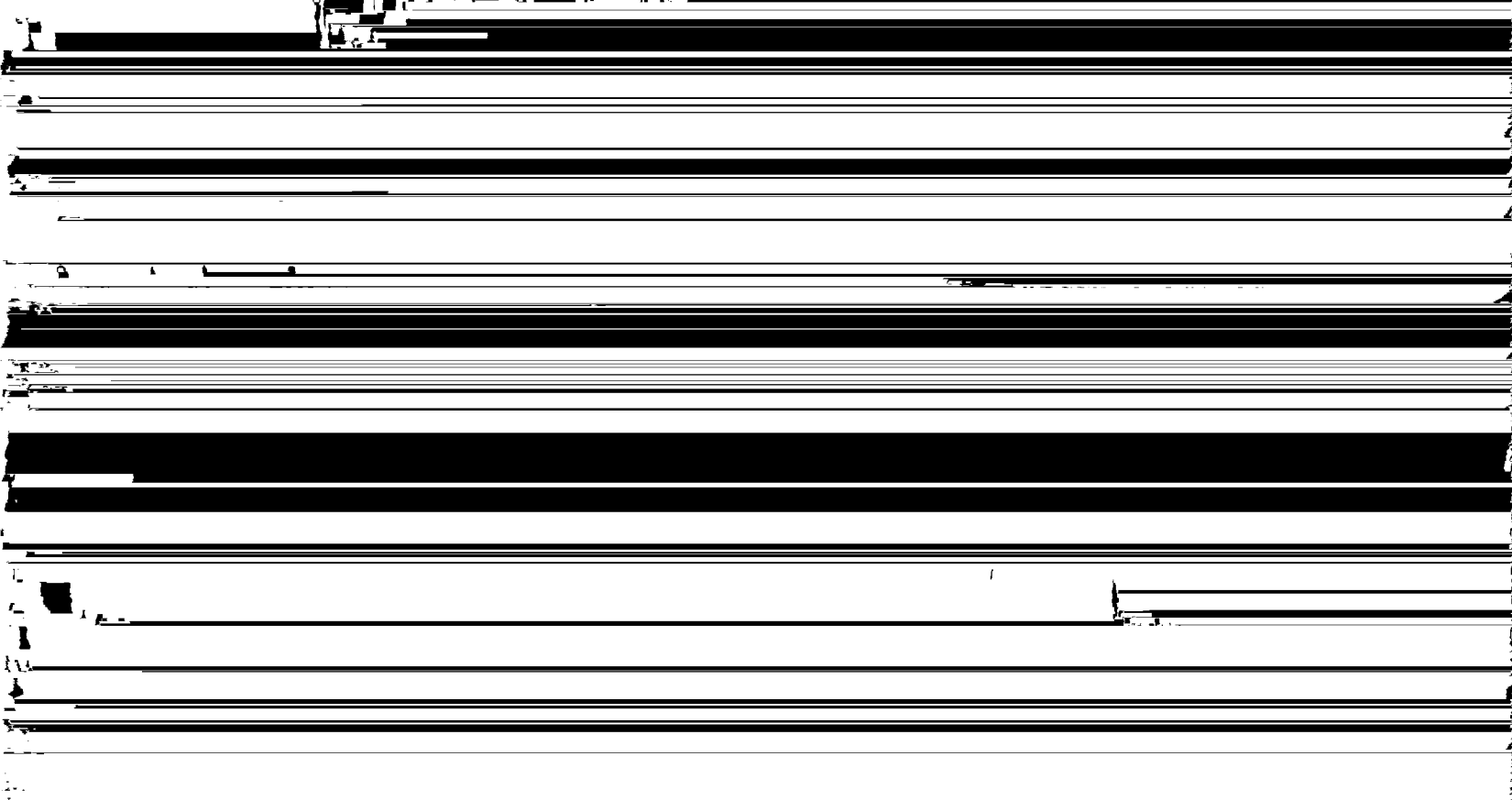
The issues in question all relate to EZ's basic qualifications to remain a Commission licensee, which is clearly a controlling question in this comparative renewal proceeding. With respect to untimely petitions to enlarge issues, issues relating to an applicant's basic qualifications meet the "substantial public importance" portion of the test for consideration of such petitions. Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, 69 RR 2d 946, 947 (1991) at ¶9. Allegheny's petition, which was timely filed, clearly involved controlling questions of law concerning EZ's basic qualifications. The first requirement for certification is therefore met.

B. Expedition of Litigation

Before explaining why a substantial ground for difference of opinion exists, it is appropriate to explain why a grant of this certification request would materially expedite this litigation. If this certification request was denied, and if Allegheny deferred an appeal of the HDO until after a final

Review Board decision was issued,³ there is a substantial possibility that either the Commission or the Court of Appeals would hold that a hearing was required to be held on one or more of the issues requested by Allegheny. A brand new hearing would then have to be held, which would cause major delays in the resolution of this proceeding.

The Court of Appeals has not hesitated to require the Commission to hold further hearings when the Commission has erroneously refused to specify hearing issues. Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 71 RR 2d 1386 (D.C. Cir. 1993), David Ortiz Radio Co. v. FCC, 941 F.2d 1253, 69 RR 2d 1011 (D.C. Cir. 1991). It would not be in the interest of ~~F7~~ ~~Allegheny~~ the Commission or the public



interest, convenience and necessity. Section 309(d)(1) of the Communications Act, 47 U.S.C. §309(d)(1). If the facts can possibly be read to support the petitioner's ultimate inference, the prima facie showing has been made. Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561, 65 RR 2d 538, 541 (D.C. Cir. 1988), citing Gencom, Inc. v. FCC, 832 F.2d 171, 181 (D.C. Cir. 1987). Then, if any substantial and material question of fact exists, a hearing must be held. Section 309(d)(2) of the Communications Act, 47 U.S.C. §309(d)(2).

The HDO does not reflect any awareness of the standards to be used in evaluating petitions to deny, and it improperly holds Allegheny to a higher standard than the standard

established by the Communications Act. The hearing petition

HDO because the HDO is based upon a series of crucial factual or legal errors. These errors will be discussed individually with respect to each issue.

1. Indecency Issue

As noted above, indecent programming is an issue of fundamental importance to the Commission. The HDO, however, denied Allegheny's request for an indecency issue primarily on procedural grounds. Specifically, the staff faulted Allegheny for not providing a tape, transcript or significant excerpt from the programs, and it noted that it had not received any complaints alleging indecent programming other than Allegheny's petition. HDO, ¶9.

Both of the HDO's procedural arguments are utterly meritless. Allegheny provided the Commission with the arbitrator's opinion, which provided an exact quote of the January 22, 1988 broadcast, and contained detailed findings on the other broadcasts remarking on Ms. Randolph's sexual behavior. It is absolutely incorrect that Allegheny left the Commission to speculate as to the nature and context of the broadcasts. The arbitrator's opinion demonstrates that it was broadcast over WBZZ(FM) that Ms. Randolph was having promiscuous sex with various people on cruise ships, in Cape Cod, with members of a hockey team, and with the U.S. Marines. Moreover, EZ's opposition to Allegheny's petition made no serious attempt to contest the accuracy of the arbitrator's

findings concerning what was broadcast over the air. As the HDO states (at ¶8), indecency is "language or material that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Since the cited passages undoubtedly refer to sexual activity, the only remaining question is whether the references were patently offensive. The arbitrator's opinion speaks to that point:

The conduct on the part of the disc jockeys was degrading, humiliating, and a serious invasion of her personal rights and dignity. I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults...

Attachment 2, P. 13. The Commission may not act like the proverbial ostrich and stick its head in the sand when faced with specific evidence of indecent programming.⁴

The fact that no other indecency complaint was filed against WBZZ is absolutely irrelevant. The Commission may not refuse to consider specific factual allegations in a petition to deny because those allegations have not previously been presented in a complaint. The Court of Appeals has held that the Commission is required to consider obscenity allegations in a renewal proceeding. Monroe Communications Corp. v. FCC,

⁴ With respect to the time period, Allegheny established that the material was broadcast in the morning, within the period in which indecent programming is prohibited. HDO, ¶¶7-8.

900 F.2d 351, 357-358, 67 RR 2d 843, 847-848 (D.C. Cir. 1990).
No rational basis exists for treating indecency differently.

The HDO's substantive discussion of the evidence of indecency is limited to the following:

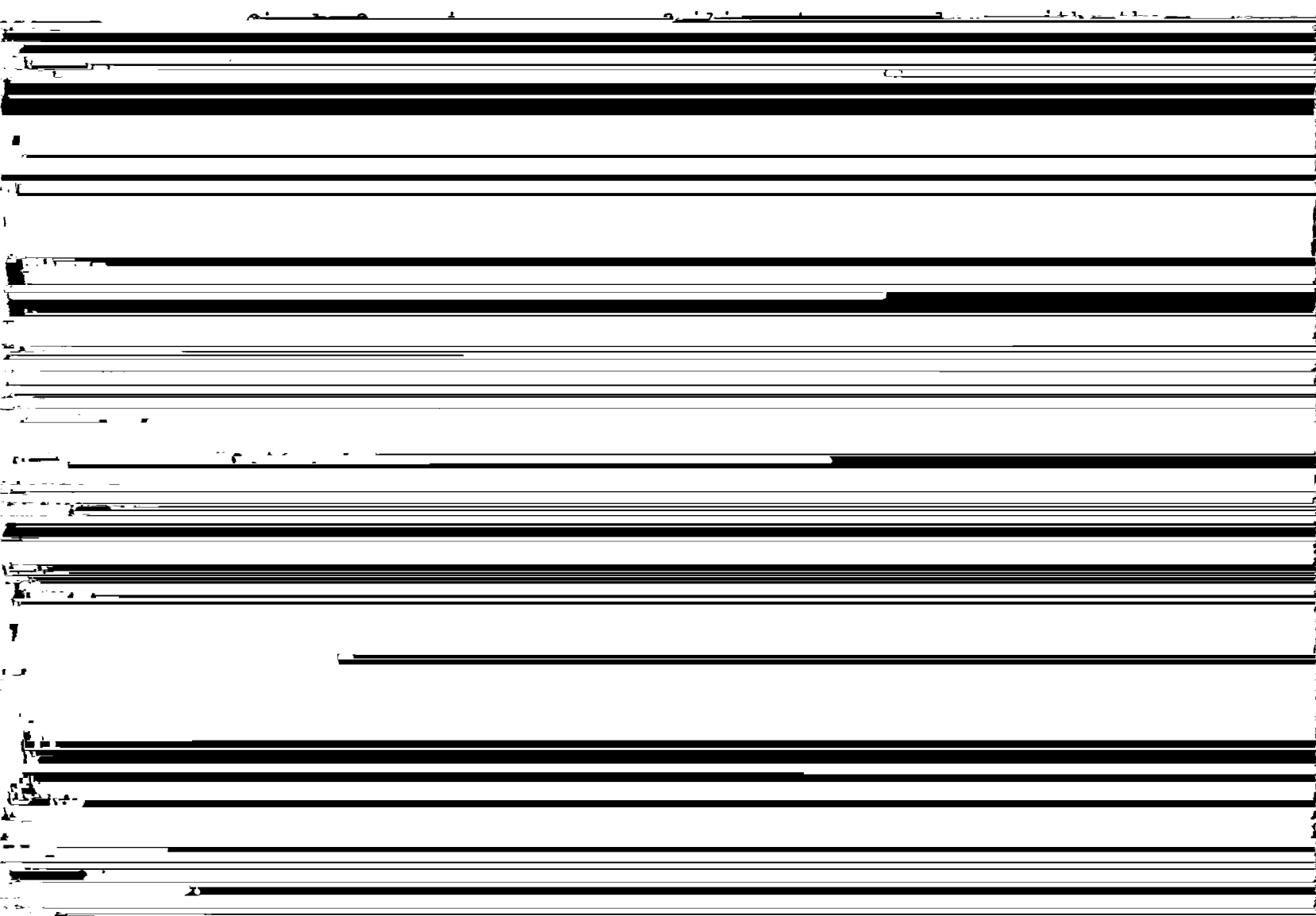
As a final matter, even if we were to find that the 'joke' itself was indecent, we would be disinclined to designate an issue against EZ based on an isolated incident which apparently was never repeated. This is especially so in light of the evidence that upon learning of the 'joke,' management took immediate action by suspending the announcers responsible and investigating the incident.

HDO, ¶9. That discussion bears no relationship to reality. The January 22, 1988 broadcast was the last in a series of similar broadcasts that had taken place over a two year period. The "joke" was anything but an isolated incident. As for the station's reaction to the incident, the main reaction to the continuing abuse heaped upon Ms. Randolph was to fire

hiring, or promoting" of employees is not prohibited by the Commission's EEO rule. No authority is cited for that proposition because none exists. Section 73.2080(b)(4) of the Commission's rules requires all licensees to:

[c]onduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon...sex from its personnel policies and practices and working conditions... (Emphasis added).

Moreover, the HDO refuses to recognize that Ms. Randolph was



1. The first part of the document is a header section containing the title "THE HISTORY OF THE UNITED STATES OF AMERICA" and the author "BY JAMES M. SMITH, LL.D.".

2. The second part of the document is a table of contents listing the chapters and their corresponding page numbers.

3. The third part of the document is the main body of text, which is divided into chapters and sections. The chapters are numbered 1 through 10, and the sections are numbered 1 through 10.

4. The fourth part of the document is a list of references and footnotes, which are numbered 1 through 10.

5. The fifth part of the document is a list of appendices, which are numbered 1 through 10.

6. The sixth part of the document is a list of indexes, which are numbered 1 through 10.

7. The seventh part of the document is a list of maps, which are numbered 1 through 10.

8. The eighth part of the document is a list of illustrations, which are numbered 1 through 10.

9. The ninth part of the document is a list of tables, which are numbered 1 through 10.

10. The tenth part of the document is a list of figures, which are numbered 1 through 10.

settlement payment was in exchange for her agreeing not to file. Id. The transcript of the settlement conference plainly shows otherwise. First, Ms. Randolph's intentions with respect to WBZZ were made clear when she filed a complaint with the Commission. In describing the settlement, the Judge said:

"this settlement encompasses the plaintiff withdrawing their letter of inquiry with the FCC."

He went on to say:

"Further, the plaintiff agrees that she will not file a complaint with the FCC. She will not assist anybody in filing a complaint with the FCC. She will in no way directly or indirectly assist anybody in filing a complaint."

Attachment C - Transcript, Pg. 1-2 The Judge said: "It is

never threatened to file anything against WBZZ's renewal application is just plain wrong.

The HDO also states that entering into a settlement agreement in a civil case is not an abuse of process. Allegheny never argued that the settlement agreement, per se, was an abuse of process. Instead, it was the attempt to prevent Ms. Randolph from testifying, even in the face of a Commission subpoena, that constituted the abuse of process. The cases cited by Allegheny and by ¶14 of the HDO stand for the proposition that it is an abuse of process to obstruct the Commission and other parties from attempting to obtain relevant and necessary testimony from a witness. EZ has engaged in such conduct.

Moreover, while the HDO admits that "Allegheny has the right to gather all the information concerning EZ that it can..." (HDO, ¶15), it fails to note that EZ attempted to deny that right by having the court records sealed. As Allegheny demonstrated in its petition to deny, the only reason EZ could have wanted to have the records sealed was to prevent other parties from discovering information relevant to its qualifications. The fact that Allegheny was able to obtain information before the record was sealed does not excuse EZ's misconduct. Furthermore, Allegheny cannot know what additional information it could have obtained if the record had not been sealed. The HDO also fails to consider that EZ

Allegheny also sought a general issue to determine the effect of the final adjudications in the arbitration proceeding and the jury trial on EZ's qualifications. While the HDO refers to a request for a "civil misrepresentation" issue, the requested issue was actually somewhat broader. The HDO denied the requested issue because "the litigation has ended in a settlement to the apparent satisfaction of the parties..." HDO, ¶13. As Allegheny has shown with respect to the sexual discrimination issue, that reasoning is both legally and factually incorrect.

It is important that the defamation EZ engaged in is particularly relevant to EZ's qualifications because it was repeatedly broadcast over WBZZ(FM). Programming is clearly the central purpose of a broadcast station. The use of a broadcast station to defame an individual is broadcast-related misconduct. Voce Intersectario Verdad America, Inc., 100 FCC 2d 1607, 1611, 58 RR 2d 445, 448 (Rev. Bd. 1985). Here, where the defamation was repeated extensively, substantial and material questions of fact exist concerning EZ's

5. News Distortion Issue

The HDO refused to specify a news distortion issue because there was allegedly no evidence that the statements in question were part of a news broadcast. HDO, ¶6. That is an invalid reason for not specifying an issue. In the Policy Statement, supra, 102 FCC 2d at 1213, 59 RR 2d at 825, the Commission said:

"...any type of programming, including those types of programs such as astrology programs, foreign language broadcasts, etc., could be presented in a manner which would run afoul of our existing prohibitions against news distortion or fraudulent programming."

Clearly the misconduct in question is not prohibited only in formal newscasts.

IV. CONCLUSION

The HDO's denial of Allegheny's petition to deny is rife with fundamental factual and legal errors. The Presiding Judge need not agree with that statement, however, in order to grant this motion. So long as the Presiding Judge finds a substantial ground for difference of opinion, certification is required because controlling questions of law are present and certification would materially expedite the litigation by avoiding the substantial possibility of a remand.

Accordingly, Allegheny asks the Presiding Judge to certify that it may file an immediate application for review of Paragraphs 2 through 15 of the Hearing Designation Order.

Respectfully submitted,

ALLEGHENY COMMUNICATIONS GROUP, INC.

By Morton L. Berfield
Morton L. Berfield

By John J. Schauble
John J. Schauble

Cohen and Berfield, P.C.
1129 20th Street. NW. #507

Picking up where they left off last year, House Telecommunications Subcommittee members **Rick Boucher (D-Va.)** and **Mike Oxley (R-Ohio)** have scheduled a press conference today (March 29) on Capitol Hill to reintroduce a bill that would permit telcos to operate cable systems in their telephone-

